BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES A. LATTA Claimant VS. **THE BOEING COMPANY - WICHITA** Respondent AND **AETNA CASUALTY & SURETY COMPANY** Insurance Carrier AND **WORKERS COMPENSATION FUND**	)	Docket No. 179,195

ORDER

Both claimant and respondent request review of the Award of Administrative Law Judge John D. Clark entered in this proceeding on October 12, 1994.

APPEARANCES

Claimant appeared by his attorney, James B. Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Vaughn Burkholder of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Eric R. Yost of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review. In addition, the respondent, insurance carrier and the Workers Compensation Fund have stipulated that the Workers Compensation Fund is responsible for twenty percent (20%) of the benefits and costs payable in this proceeding.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a four percent (4%) whole body functional impairment rating and held that the respondent and its insurance carrier were responsible for the entire Award. The respondent and its insurance requested review of the issue of fund liability. The claimant requested a review of the finding of the nature and extent of disability. At oral argument the parties announced that they had reached an agreement regarding the issue of fund liability. Therefore, the only issue now before this Board is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified to grant claimant permanent partial disability benefits based upon a twenty-five percent (25%) work disability from the date he was laid off from the respondent on May 11, 1993.

Claimant alleged he sustained bilateral hand and wrist injury while working for the respondent during the period of April 9, 1992 through March 4, 1993. The Administrative Law Judge found that claimant sustained a compensable injury and awarded claimant permanent partial disability benefits for an accident occurring on May 19, 1992. The parties did not request the Appeals Board to review the finding pertaining to the date of accident.

Approximately six (6) months after starting to work for the respondent, claimant began to experience symptoms in both wrists. Claimant attributes these symptoms to moving fifty-five (55) gallon drums weighing approximately three hundred to four hundred (300-400) pounds. Claimant reported the symptoms to his supervisor and respondent's medical department which in turn referred claimant to orthopedic surgeon J. Mark Melhorn, M.D.

Dr. Melhorn saw claimant for one (1) month between May 19 and June 18, 1992. He provided conservative treatment including casting claimant's right arm and diagnosed claimant's condition as bilateral hand/wrist tendinitis and left distal radial ulnar joint with articular changes before releasing claimant without restrictions on June 18, 1992. Dr. Melhorn testified that he did not believe claimant had any loss of functional capacity when he last saw him, although he noted that claimant might have been at increased risk of further injury.

After his release from Dr. Melhorn, claimant continued to work for the respondent and continued to experience symptoms in his hands and wrists. In January, 1993 claimant experienced a flare-up in his symptoms and again reported to respondents's medical department. On this occasion the respondent referred claimant to orthopedic surgeon James L. Gluck, M.D., who treated claimant for bilateral wrist pain from the date of the initial visit on February 2, 1993 through May 27, 1993. At the time of their last visit, claimant had already been laid off from the respondent and had returned to a former employer, Reddi-Root'R, driving a truck and pumping septic tanks and sewage pits. Because claimant was able to do that job without significant problems, Dr. Gluck believed

he was not functionally limited nor impaired by reason of his pain and, therefore, believed claimant had a zero percent (0%) functional impairment rating. However, at their last meeting, Dr. Gluck placed permanent work restrictions on claimant. In his discharge summary, dated May 27, 1993, Dr. Gluck wrote:

> "I explained to the patient, I think at this point he is doing well from a functional stand point. I would not recommend any further medical diagnostic or therapeutic interventions. I explained to him the only therapeutic intervention that could be considered would be a wrist arthroscopy. I don't think that that is indicated given the mild symptoms and no significant functional restrictions. Therefore, I would recommend that he adjust his activities according to the level of his discomfort. He can use wrist splints as he finds helpful. He will follow up on a prn basis. He is discharged from my care.
>
> PERMANENT WORK RESTRICTIONS:
> He can lift 50# occasionally and 10# frequently. He can grasp up to 40# occasionally and 20# frequently. He needs to wear the wrist splints as he finds helpful.
>
> IMPAIRMENT RATING:
> I feel that he has reached his maximal medical improvement. Given that he has excellent motion and function he has a 0% impairment to both the right and left upper extremity."

The opinions of doctors Ernest R. Schlachter, M.D., and Kenneth D. Zimmerman, M.D., were also provided. Dr. Schlachter evaluated claimant on June 4, 1993, and diagnosed bilateral tendinitis of the wrists and degenerative changes in the left wrist. Dr. Schlachter believes claimant has an eight percent (8%) whole body functional impairment as a result of this diagnosis and should observe the permanent work restrictions of no twisting or pulling motions with either arm or hand more than five (5) times per hour, and no repetitive lifting more than twenty (20) pounds with either hand or thirty (30) pounds on a single basis with either hand and only with the wrists in optimum position. Dr. Gluck believes these restrictions are reasonable and very similar to his own.

Dr. Zimmerman is employed by the respondent as one of its occupational medicine physicians in its medical department. He testified he also believes claimant has an eight percent (8%) functional whole body impairment rating and believes claimant should observe the permanent restrictions placed upon him by Dr. Gluck and the restrictions against repetitive activities as delineated by Dr. Schlachter.

As indicated above, claimant was laid off on May 11, 1993. Shortly thereafter, on May 20, 1993, claimant began working for a former employer, Reddi-Root'R, as a driver and operator of a waste-pumping truck. Claimant testified this job is easier than his former job at respondent's plant. The heaviest item claimant now must lift is the end of a three-inch (3") vacuum hose, and he is no longer required to continuously push and pull as his former job required. At regular hearing claimant testified he was earning twelve dollars ($12.00) per hour in his new job, or $480.00 per week. Also, claimant testified he was not receiving any fringe benefits as part of his compensation package. However, claimant told his labor market expert, Jerry D. Hardin, that he was earning approximately $800.00 per week as a pumping truck driver.

Because his is a "non-scheduled" injury, claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1991 Supp. 44-510e. The statute provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Regarding the issues of loss of ability to perform work in the open labor market and loss of ability to earn comparable wage, the parties presented the testimony of two labor market experts, Jerry D. Hardin and Maurice Entwistle. Mr. Hardin testified claimant has a sixty to sixty-five percent (60-65%) loss of ability to perform work in the open labor market utilizing the restrictions of Dr. Gluck and a loss of seventy to seventy-five percent (70-75%) utilizing the restrictions of Dr. Schlachter.

On the other hand, Mr. Entwistle testified that he believes claimant has lost seven percent (7%) of his ability to perform work in the open labor market assuming Dr. Gluck's restrictions constitute a loss of the heavy category of labor only and that claimant has no restrictions against repetitive hand activities. However, Mr. Entwistle did testify on cross-examination that claimant would have a twenty percent (20%) loss of ability to perform work in the open labor market if he were restricted to both the sedentary and light labor categories and a thirty percent (30%) loss if he were restricted to the sedentary labor category only. Also, if claimant were restricted from repetitive activities, Mr. Entwistle believes claimant would have, at a minimum, a twenty-five percent (25%) loss of ability to perform work in the open labor market regardless of any other restrictions. Mr. Entwistle was unable to provide an opinion of loss, with which he was comfortable, assuming claimant had both weight lifting restrictions and restrictions against repetitive hand activities.

Based upon this evidence, the Administrative Law Judge found claimant was entitled to permanent partial disability benefits based upon a four percent (4%) functional impairment rating. The Administrative Law Judge reasoned that claimant returned to work for the respondent after being released by his physician and that he earned as much as, or more than, he was earning at the time of the accident. Therefore, the Administrative Law Judge applied the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e, as quoted above. However, the Appeals Board finds the presumption has been overcome for the period after claimant was laid off by the respondent. To hold otherwise would not encourage employers to return injured individuals to regular or accommodated employment nor take into consideration the economic realities of the open labor market once they have been layed off. Such was not the intention of the legislature when it enacted the 1987 amendments to K.S.A. 44-510e. The legislature intended to reduce permanent partial benefits when an injured employee returned to work and was earning a comparable wage. As practitioners will recall, the law prior to the 1987 amendments permitted an individual to collect permanent partial disability benefits based upon a high

percentage of work disability despite the fact the individual returned to work and suffered no wage loss.

Based upon the above, the presumption of no work disability is applicable for the period between May 19, 1992 and May 11, 1993, and during that period claimant is entitled to permanent partial disability benefits based upon the functional impairment rating. The Appeals Board finds no compelling reason to disturb the finding of the Administrative Law Judge that claimant's whole body functional impairment is four percent (4%). Because claimant's additional compensation items continued during this period of his employment, claimant's permanent partial disability benefits for this period are to be based upon his average weekly wage, excluding the additional compensation items which the parties stipulated to be $602.00.

For the period after May 11, 1993, the Appeals Board finds claimant is entitled permanent partial disability benefits based upon an average weekly wage of $881.71 and a work disability of twenty-five percent (25%) which is an average of claimant's loss of ability to perform work in the open labor market and his loss of ability to earn a comparable wage, as indicated below.

The Appeals Board finds claimant has lost nine percent (9%) of his ability to earn a comparable wage. This conclusion is based on the finding that claimant retains the ability to earn approximately $800.00 per week, as he advised Mr. Hardin. Comparing this figure to the stipulated average weekly wage of $881.71, yields a difference of nine percent (9%). Based upon the testimony of Mr. Hardin and Mr. Entwistle, the Appeals Board finds claimant has sustained a loss of ability to perform work in the open labor market of approximately forty-two percent (42%). The Appeals Board finds a seven percent (7%) loss proposed by Mr. Entwistle to be low, indeed, as he failed to consider the loss of access to the open labor market due to restrictions against repetitive activities. In addition, Mr. Entwistle failed to consider the occupations in the medium category of labor that claimant is unable to perform as a result of the weight lifting restrictions. On the other hand, Mr. Hardin's opinions of loss of access to the open labor market of sixty to sixty-five percent (60-65%) and seventy to seventy-five percent (70-75%) appear high as he excludes entire categories of the labor market when the physicians' restrictions would permit some of the occupations in those categories to be performed.

The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor greater weight and, accordingly, they will be weighed equally. The result is an average between the forty-two percent (42%) loss of ability to perform work in the open labor market and the nine percent (9%) loss of ability to earn a comparable wage resulting in a twenty-five percent (25%) work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

Because claimant no longer receives the additional compensation items he received while working for the respondent, the permanent partial disability benefits payable for the period following May 11, 1993 are based upon the average weekly wage including the additional compensation items which the parties stipulated to be $881.71.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark entered in this proceeding on October 12, 1994, should be modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, James A. Latta, and against the respondent, The Boeing Company-Wichita, and the insurance carrier, Aetna Casualty & Surety Company and the Kansas Workers Compensation Fund, for an accidental injury sustained on May 19, 1992.

During the period of May 29, 1992 through May 11, 1993, and based on an average weekly wage of $602.00, claimant is entitled to 51.14 weeks of compensation at $16.05 per week in the sum of $820.80 for a 4% permanent partial general body disability and for the period following May 11, 1993, and based on an average weekly wage of $881.71, claimant is entitled to 363.86 weeks of compensation at $146.96 per week in the sum of $53,427.87 for a 25% permanent partial general body disability, for a total award of $54,293.67.

As of October 13, 1995, there would be due and owing to claimant 51.14 weeks of permanent partial compensation at $16.05 per week in the sum of $820.80 followed by 126.29 weeks of permanent partial compensation at the rate of $146.96 per week or $18,559.58, for a sum of $19,380.38 which is due and owing and ordered paid in one lump sum less compensation previously paid. Thereafter, the remaining balance in the amount of $34,913.29 is ordered paid at $146.96 per week for 237.57 weeks until fully paid or further order.

Pursuant to the stipulation of the parties, the respondent and insurance carrier are responsible for 80% of the costs and benefits payable in this proceeding and the Workers Compensation Fund is responsible for the remaining 20%.

Pursuant to K.S.A 44-536, the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent/carrier to be paid directly as follows:

Barber & Associates Transcript of Regular Hearing	$189.40
Kelley, York & Associates, Ltd Deposition of Jerry D. Hardin	$318.25
Kelley, York & Associates, Ltd Deposition of Ernest R. Schlachter, M.D.	$177.10
Deposition Services Deposition of James L. Gluck, M.D.	$158.20
Deposition Services	

Deposition of J. Mark Melhorn, M.D.	$115.60
Deposition Services Deposition of Kenneth D. Zimmerman, M.D.	$431.20
Deposition Services Deposition of Maurice Entwistle	$293.00

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, Kansas
Vaughn Burkholder, Wichita, Kansas
Eric R. Yost, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director